Supreme Court, U.S.
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No. 98-1805

In the Supreme Court of the United States

GAIL MERCHANT IRVING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the *sua sponte* grant of rehearing en banc exceeded the authority of the court of appeals.

2. Whether the court of appeals erred in concluding that the actions of Occupational Safety and Health Administration inspectors in conducting workplace safety inspections were within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680 (1994 & Supp. III 1997).

3. Whether the court of appeals abused its discretion in considering *sua sponte* whether petitioner's claims were barred by the discretionary function exception, when the government had not pressed the issue on appeal from the final judgment.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. A1-A67) is reported at 162 F.3d 154. The opinion of the district court (Pet. App. E1-E60) is reported at 942 F. Supp. 1483.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on December 18, 1998. A petition for rehearing was denied on February 9, 1999 (Pet. App. D1-D2). The petition for a writ of certiorari was filed on May 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1981, petitioner filed this suit in the United States District Court for the District of New Hampshire under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680 (1994 & Supp. III 1997), alleging that negligence by Occupational Safety and Health Administration (OSHA) inspectors in performing plant safety inspections proximately caused her injuries in a workplace accident. Pet. App. E1-E2. Specifically, petitioner alleged that, during general administrative inspections conducted in 1975 and 1978, OSHA compliance officers negligently failed to note and cite an unguarded condition of a die-out machine located near her work station. According to the complaint, these failures proximately caused petitioner's injuries because documentation and citation of this condition would have caused her employer to take corrective action. *Ibid.*

The government moved to dismiss the suit on the ground that the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), barred petitioner's claim. Although the district court initially denied the motion and conducted a trial, it concluded after trial that the discretionary function exception barred the claim and dismissed the action for want of subject-matter jurisdiction. See Pet. App. C10-C11. On appeal, the court of appeals vacated the order of dismissal and directed the district court to reconsider the applicability of the discretionary function exception in light of this Court's decision in *Berkovitz* v. *United States*, 486 U.S. 531 (1988). See *Irving* v. *United States*, 867 F.2d 606 (1st Cir. 1988) (Table).

On remand, the district court concluded that *Berkovitz* did not alter the result and that the action was

barred by the discretionary function exception. See Pet. App. C11. On appeal, the court of appeals again vacated the judgment and remanded the action for a further determination of the applicability of the discretionary function exception, concluding that further analysis and factfinding were necessary to determine what OSHA policy actually required of OSHA compliance officers engaged in inspection activities. See *id.* at G1-G15. The district court, however, held on remand that the government was not negligent, and accordingly entered judgment in its favor. The district court did not address the discretionary function exception. See *id.* at C12. Petitioner appealed, and the court of appeals reversed the district court's negligence finding and vacated the judgment. With respect to the discretionary function exception, which the government had raised as an alternative ground for affirming the judgment, the court held that its prior decision prevented it from passing on that issue without further factfinding. The court again remanded the case. *Id.* at F1-F13.

On remand, the district court concluded that the discretionary function exception did not apply. Finding that the OSHA inspectors had been negligent in not examining the die-out machine or citing it to the employer as a safety violation, the district court held the government liable for the accident. Pet. App. E1-E53. The government appealed, arguing principally that the predicate for liability under the FTCA had not been satisfied because a private person would not be liable to plaintiff under state law in the same circumstances. Gov't C.A. Br. 6-7. The government stated in a footnote that it did "not appeal the [district] court's finding regarding the application of the discretionary function exception," given that the finding was "limited to the specific factual circumstances [that the court]

found existed during the time and [in the] area" at issue. *Id.* at 4 n.1. On April 8, 1998, a divided panel of the court of appeals affirmed the judgment. Pet. App. C1-C4.

2. On June 8, 1998, the full court of appeals, acting *sua sponte*, withdrew the panel opinion and ordered rehearing en banc (see Pet. App. B1) "to review the * * * question of whether the FTCA's discretionary function exception foreclosed the plaintiff's negligent inspection claim." *Id.* at A2. On rehearing en banc, the court first addressed and rejected petitioner's argument that, because the government had not asked the panel to reverse the district court's refusal to apply the discretionary function exception, and in fact had conceded that issue in the district court, the en banc court was precluded from considering the issue. The government, the court pointed out, did not concede the discretionary function defense before the district court; to the contrary, it had "persistently raised" the defense since the beginning of the case. *Id.* at A7-A8. Observing that two earlier panels of the court "had squarely rebuffed the * * * discretionary function defense," the court found that "strong arguments" existed for not applying forfeiture, because the government had "good reason" not to raise the defense yet again on appeal. *Ibid.* The court then resolved the issue by concluding that, at any rate, the discretionary function exception "implicates the federal courts' subject matter jurisdiction," a question that the courts are duty-bound to examine and that neither party can waive or concede. *Id.* at A8-A10.

The court went on to address the merits of the discretionary function defense. Citing *United States* v. *Gaubert*, 499 U.S. 315 (1991), the court stated that the discretionary function exception applies only where two

conditions are satisfied: (1) the conduct at issue must be discretionary; and (2) the exercise of discretion must involve or be susceptible to policy-related judgments. Pet. App. A12. The court found both conditions satisfied. As to the first, the court found that the relevant portion of the Occupational Safety and Health Act "places virtually no constraint on the Secretary's discretion to conduct * * * inspections in any way that she sees fit" (*id.* at A13); that "the legislative rules governing the authority of compliance officers mimic the statute and grant these officials broad discretion over the scope, manner, and detail of general administrative inspections" (*id.* at A14); and, consequently, that general administrative inspections constitute discretionary conduct within the meaning of the FTCA. As to the second, the court observed that "OSHA may legitimately devote its limited enforcement resources to monitoring workplaces and working conditions that pose the most serious threats to worker health and safety" (*id.* at A25); that OSHA inspectors must "make daily judgments about what risks and safety issues most urgently require their attention" (*id.* at A26); and that the inspectors' "day-to-day decisions * * * further OSHA's enforcement policy of ensuring adequate safety in workplaces with a view toward efficient and effective use of limited enforcement resources, and are thus grounded in policy" (*ibid.*). The court thus held that the discretionary function exception barred petitioner's claim.[1]

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[1] Senior Judge Bownes, joined by Judge Lipez, dissented on the ground that the discretionary function exception did not bar petitioner's action. Judge Bownes argued that the OSHA inspectors lacked discretion in how they conducted the compliance inspections because their superiors already had determined that

The court denied petitioner's subsequent request for rehearing. Pet. App. D1-D2. In doing so, the court explained that "[t]he initial request for rehearing en banc was made, albeit provisionally, by a judge of this court on April[] 20[,] 1998, well before the time for filing a petition for rehearing en banc had expired." *Ibid.* The court therefore concluded that "the en banc court had jurisdiction to proceed" (*id.* at D2), and rejected petitioner's request after finding that her arguments threw "no new light * * * on the matters heard and determined" on rehearing en banc. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioner first claims (Pet. 15-19) that the grant of en banc review on June 8, 1998, exceeded the authority of the court of appeals because it occurred after the issuance of the mandate and therefore involved a recall of the mandate. Petitioner is mistaken. To begin, the premise of petitioner's argument fails because, so far as the record reveals, the court of appeals never issued the mandate. The panel issued its decision and entered judgment on April 8, 1998. Under the applicable rules, the mandate ordinarily would have issued on June 2, 1998—seven days after the expiration of the time to file a petition for rehearing, which in this case was 45 days. See Fed. R. App. P. 40(a)(1), 41(b); see also *ibid.* ("The court may shorten or extend the time" in which the mandate may issue.). As the court of appeals explained,

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the inspections must encompass an evaluation of all potential hazards at this particular workplace. Pet. App. A30-A67.

however, in this case a judge of the court made an initial request for rehearing on April 20, 1998, twelve days after the panel had issued its opinion and judgment. Consequently, the court of appeals did not issue the mandate, and no evidence in the record suggests otherwise.[2] Because of this, the order granting en banc review, as its plain terms reveal (see Pet. App. B1-B2), did not entail a recall of the mandate, and the court of appeals, as it rightly explained in denying petitioner's request for rehearing, acted while it had full authority to do so. Even the two dissenters from the en banc decision did "not question the court's authority to call *sua sponte* for en banc review." *Id.* at A31 n.14.

Moreover, even had the court of appeals recalled the mandate in connection with its grant of en banc review, doing so would not have constituted the kind of egregious misuse of judicial power that warrants this Court's exercise of its supervisory powers over the lower federal courts. The courts of appeals possess an inherent power to recall their mandates, subject to review only for abuse of discretion. *Calderon* v. *Thompson*, 523 U.S. 538, 549-550 (1998); *Hawaii Hous. Auth.* v. *Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers). In this case, as noted, p. 6, *supra*, the mandate ordinarily would have issued on June 2, 1998 absent other actions by the court. The court of appeals granted rehearing en banc on June 8, 1998. Given the short duration between the earliest date on which the mandate could have issued and the date on which the court of appeals granted en banc review, a recall of the mandate would not have been an abuse of dis-

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[2] A July 23, 1999, telephone inquiry to the First Circuit confirmed that the Clerk's Office has no record of the mandate having issued.

cretion. Cf. *Midkiff*, 463 U.S. at 1324 (Rehnquist, J., in chambers) (recall of mandate "some four months" after court of appeals' opinion on the merits had issued was not an abuse of discretion). Indeed, before June 8, 1998, there could be no reliance on the mandate either by the parties or by others given that the time to seek review by this Court had not yet expired. See Sup. Ct. R. 13.

Calderon does not alter this analysis. In *Calderon*, this Court invoked its supervisory powers to reverse a decision of a court of appeals in which the court had recalled its mandate *sua sponte*. 523 U.S. at 566. The Court did so, however, based on the unique circumstances of the case and the nature of the action in the court of appeals, a habeas petition brought by a state prisoner who had been sentenced to death. Noting that "[t]he promptness with which a court acts to correct its mistakes is evidence of the adequacy of its grounds for reopening the case," the Court pointed out that the recall came 53 days after the mandate had issued and only two days before the prisoner was scheduled to be executed. *Id.* at 552, 548. In the interim, "the executive branch of California's government," through the State's governor, "took extensive action in reliance on the mandate" by considering and denying a request for clemency. *Id.* at 552. The Court concluded that the court of appeals abused its discretion in recalling the mandate under such circumstances, for in doing so it failed adequately to consider both "the * * * vital interests of California's executive branch" (*ibid.*) and "the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 555 (citing *Wood* v. *Bartholomew*, 516 U.S. 1, 8 (1995) (per curiam)). Here, of course, federalism concerns are not implicated and there has been

neither inordinate delay by the court of appeals nor any reliance upon the finality of the panel's decision.

2. Petitioner next argues (Pet. App. A19-A23) that the court of appeals erroneously resolved the discretionary function exception in a manner inconsistent with this Court's precedent. Petitioner's argument is without merit. The FTCA's discretionary function exception, 28 U.S.C. 2680(a), excludes any claim which is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This Court has articulated a two-prong test to determine whether challenged conduct falls within the discretionary function exception. First, in examining the nature of the challenged conduct, a court must consider whether the action is a matter of choice for the acting employee. See *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). Second, the discretion involved in the choice of conduct must be grounded in considerations of public policy, whether it be social, economic, or political. See *Gaubert*, 499 U.S. at 323; *Berkovitz*, 486 U.S. at 536-537.

The court of appeals adhered to and correctly applied this standard in ruling on the discretionary function exception. With respect to prong one, the court observed that the relevant portion of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), "places virtually no constraint on the Secretary's discretion to conduct * * * inspections in any way that she deems fit." Pet. App. A13. The court also found that "[t]he relevant regulations * * * explicitly grant compliance officers the same broad discretion enjoyed by the Secretary with respect to such inspections." *Id.* at A16.

Based on those observations, the court concluded that the determination how to conduct an administrative inspection on behalf of OSHA was discretionary conduct "involv[ing] an element of judgment or choice." *Berkovitz*, 486 U.S. at 536; see also *Gaubert*, 499 U.S. at 322 ("The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'") (citation omitted). With respect to prong two, the court pointed out that OSHA inspectors cannot be expected to conduct "painstakingly comprehensive" inspections of every item in every plant. Pet. App. A26. Rather, they must "make daily judgments about what risks and safety issues most urgently require their attention," judgments which "further OSHA's enforcement policy of ensuring adequate safety in workplaces with a view toward efficient and effective use of limited enforcement resources." *Ibid.* The court thus concluded that day-to-day decisions of OSHA compliance officers are an integral part of and grounded in considerations of public policy, namely, OSHA's enforcement policies. These conclusions are correct and in accordance with the standard laid down in *Gaubert* and *Berkovitz*. They also are in accordance with the decisions of the other courts of appeals that have addressed the issue, all of which have concluded that the conduct of OSHA safety inspections falls within the discretionary function exception to the FTCA. See *Daniels* v. *United States*, 967 F.2d 1463 (10th Cir. 1992); *Judy* v. *United States*, 864 F.2d 83 (8th Cir. 1988); *Galvin* v. *United States*, 860 F.2d 181 (5th Cir. 1988); *Cunningham* v. *United States*, 786 F.2d 1445 (9th Cir. 1986).[3]

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[3] In September 1994, OSHA amended the internal guidelines

3. Petitioner's final contention is that the court of appeals lacked authority to review *sua sponte* the applicability of the discretionary function exception in light of the government's failure to press that issue before the panel, the government's earlier assertions of the defense notwithstanding. Pet. 23. The court of appeals, however, clearly had authority to consider this issue. For one thing, the government had raised the applicability of the exception earlier in the litigation only to have it "rebuffed" (Pet. App. A8) by the court of appeals. See *Irving* v. *United States*, 909 F.2d 598, 601-605 (1st Cir. 1990). The court's decision with respect to the exception thereafter became the law of the case. See Pet. App. A7-A8. In light of this, the court of appeals properly concluded that the government had "good reason" for choosing not to press the point yet again before the panel, and thus that strict application of forfeiture principles to prevent consideration of the issue by the en banc court would be inappropriate.[4]

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that govern the conduct of safety inspections in a way that reflects this understanding. Under the new guidelines, which apply to all inspections conducted nationwide, an inspection "may be deemed comprehensive even though, as a result of the exercise of professional judgment, not all potentially hazardous conditions, operations and practices within those areas are inspected." *Field Inspection Reference Manual, Chapter II–Inspection Procedures*, 4 O.S.H. Rep. (BNA) 77:0141 (Sept. 26, 1994) (Instruction CPL 2.103). The amended guidelines supersede those that applied to OSHA safety inspectors when the challenged conduct in this case occurred and remove any doubt concerning whether safety inspectors have policy-based discretion regarding how to conduct safety inspections like those at issue here. In doing so, they further detract from the need for review of the decision of the court of appeals.

[4] Contrary to petitioner's representation (see Pet. 9-10), the government did not concede the point in its brief in the court of

Moreover, because the discretionary function exception forms a condition upon the government's waiver of sovereign immunity under the FTCA, the question whether the exception applies is one of subject-matter jurisdiction, a fact that the court of appeals rightly recognized. See Pet. App. A8. The court thus had an affirmative obligation to examine the applicability of the exception on its own initiative to satisfy itself of its jurisdiction to hear the case. See, *e.g.*, *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934)); see also, *e.g.*, *Appley Bros.* v. *United States*, 164 F.3d 1164, 1169-1170 (8th Cir. 1999) (applicability of discretionary function exception is a threshold question of subject-matter jurisdiction); *Cohen* v. *United States*, 151 F.3d 1338, 1340 (11th Cir. 1998) (same), cert. denied, 119 S. Ct. 1803 (1999); *Good* v. *Ohio Edison Co.*, 149 F.3d 413, 419 (6th Cir. 1998) (same); *General Dynamics Corp.* v. *United States*, 139 F.3d 1280, 1283 (9th Cir. 1998) (same); *Tippett* v. *United States*, 108 F.3d 1194, 1196-1197 (10th Cir. 1997) (same).

The authorities cited by petitioner for the proposition that the court of appeals lacked authority to address

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appeals. To be sure, the government did state in the brief that the "failure [of the inspectors to inspect the machine] violated a mandatory policy and, as such, precluded application of the discretionary function exception." Gov't C.A. Br. 4; see Pet. 9-10 (quoting this statement). But the government made that statement merely as part of its summary of the district court's holding, not as an affirmative concession in the court of appeals. Petitioner quotes the statement out of context.

this issue are inapposite. In *United States* v. *Gaubert*, 499 U.S. 315 (1991); *Block* v. *Neal*, 460 U.S. 289 (1983); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984); and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), the Court simply observed that the government had not asserted a defense based on the discretionary function exception. The Court did not suggest that a lower court is powerless to ascertain the applicability of the discretionary function exception on its own initiative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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